group, the greater is the State's burden to justify that practice. Where a practice has a racially disparate impact, an inquiry into the State's interest may "show whether a state's policy [is] pre-textual,"[23] "indicate that the policy is unfair,"[24] or serve as "circumstantial evidence that the system is motivated by discriminatory purposes and has a discriminatory result."[25]

Even a practice serving a legitimate state interest may be invalid under Section 2 if it significantly impedes a protected group's electoral opportunities.[26] Thus, for example, redistricting plans enacted in good faith and for nondiscriminatory purposes are routinely invalidated under Section 2 because they dilute minority voting strength.[27] Courts are perfectly capable of engaging in such balancing in felony disenfranchisement cases as well.

II. Felony Disenfranchisement Laws Have Had the Purpose and Effect of Discriminating Against Minorities — The Very Evils that Congress Intended to Target in the Voting Rights Act.

Felony disenfranchisement in the United States has a deeply discriminatory history. During and after Reconstruction, Southern States enacted or amended

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[23] *Cousin v. McWherter*, 46 F.3d 568, 576 (6th Cir. 1995).

[24] *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984).

[25] *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir. 1984).

[26] *See* S. Rep. at 29 n.117 ("[A] practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the [political] process."), *reprinted in* 1982 U.S.C.C.A.N. at 207 n.117.

[27] *See, e.g., Clark v. Calhoun County*, 88 F.3d 1393, 1401 (5th Cir. 1996) (finding a § 2 violation in a redistricting plan despite upholding the district court's finding that "attempting to maintain districts with equal road mileage is nonsensous").

disenfranchisement schemes to diminish the electoral strength of the newly freed slaves.[28] Florida's disenfranchisement law was propounded by a so-called "Moderate Republican" faction whose leader later boasted that his work at the 1868 constitutional convention had kept Florida from becoming, in his words, "niggerized."[29] To this end, the "Moderates" expanded the list of crimes triggering disenfranchisement to include those crimes that blacks were believed more "prone" to commit. That strategy worked: A leader of the "Radical Republican" faction testified at the time that the 1868 constitution "disfranchises thousands of the colored voters."[30]

Congress addressed the evils of racially discriminatory felony disenfranchisement laws when it passed the Voting Rights Act and amended it in 1982. Indeed, in *Richardson v. Ramirez*,[31] this Court had all but invited Congress to do so. The *Richardson* Court rejected a nonracial equal-protection challenge to a felony disenfranchisement law based on the affirmative sanction for disenfranchisement that appears in

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[28] *See Hunter v. Underwood*, 471 U.S. at 229 (describing the "movement that swept the post-Reconstruction South to disenfranchise blacks"); *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) ("[Felony disenfranchisement statutes were] enacted in an era when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks."); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (tracing devices, including criminal disenfranchisement, added to the 1890 Mississippi Constitution to "obstruct the exercise of the franchise by the negro race"); *see also* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 537-42 (1993).

[29] Pet. App. 305a; *see also id.* at 224a.

[30] II Exs. to Pls.' Resp. to Defs.' Mot. for Summ. J., at 597; *see also* Pet. App. 206a-208a, 229a-230a.

[31] 418 U.S. 24 (1974).

the Fourteenth Amendment's Penalty Clause.[32] The Court sympathized with plaintiffs' claim that felony disenfranchisement's historic rationales were "outmoded" and with "the more modern view . . . that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term."[33] But those arguments, the Court explained, would best be directed to "the legislative forum which may properly weigh and balance them."[34]

Congress — in exercising its enforcement power under the Fifteenth Amendment — weighed the relevant factors when amending the Voting Rights Act in 1982. And Congress concluded that a "voting *qualification* or prerequisite to voting or [voting] standard, practice, or procedure"[35] — terms that surely encompass felony disenfranchisement laws generally and the Florida law in particular (since it provides that "[n]o person convicted of a felony . . . shall be *qualified* to vote")[36] — is presumptively illegal if it disparately impacts minority citizens and is maintained for tenuous reasons. Indeed, the 1982 congressional report laying out the "Senate factors" expressly instructed courts to consider the very tenuousness of state policies that the *Richardson* Court's opinion had highlighted.

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[32] *See id.* at 54-55.

[33] *Id.* at 55.

[34] *Id.*

[35] 42 U.S.C. § 1973(a) (emphasis added).

[36] FLA. CONST. art. VI, § 4 (1968) (emphasis added).

III. Historically, Felony Disenfranchisement Laws Have Never Been Justified as a Means for Advancing a State's Penal Interests.

The history of felony disenfranchisement laws reveals that, at the time of their enactment, they were never justified as a component of a law-enforcement program. Indeed, *amici* are unaware of any State enacting a felony disenfranchisement law based on a considered judgment that the law was needed to advance the State's penal objectives.

The disconnect between law-enforcement goals and felony disenfranchisement has deep roots. In ancient times, felony disenfranchisement was part of a system of ostracism or banishment, beginning with the ancient Roman notion of "infamia," a pronouncement of moral censure imposed on citizens who committed immoral or criminal acts.[37] In the Middle Ages, Germanic tribes employed the practice of "outlawry" to expel an offender from the community, causing him to be deprived both of civil rights and of society's protection. The outlaw's property was confiscated, and he could be killed with impunity by anyone.[38] Following the Middle Ages, in continental Europe, outlawry was transformed by statutory enactment into "civil death," which terminated the offender's legal existence. Dishonor and incapacity often were imposed on the offender's descendants, as well.[39]

In England, the method of imposing civil disabilities under the common law was called "attainder." Upon conviction for a felony, the offender was pronounced "attainted" and was subjected to numerous penalties,

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[37] *See* Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 721-22 (1973).

[38] *See id.* at 722-23.

[39] *See id.* at 723 & n.15.

including forfeiture (the confiscation of chattel and other goods) and "corruption of the blood," which left the attainted person unable to inherit or devise real property and escheated all his property to the lord of the estate. The offender also lost his civil rights, including the right to vote, as well as the rights to bring suit and to appear as a witness in court.[40] These penalties were "based on the fiction that the criminal's act was evidence that he and his entire family were corrupt and therefore unworthy of being feudal tenants."[41]

In America, of course, corruption of blood was banned by the Constitution (except under limited circumstances related to treason),[42] and the notion of "civil death" was firmly rejected as part of American common law.[43] As *amici* explained above, felony disenfranchisement in America is therefore more a product of racially discriminatory legislation during and after Reconstruction. But neither in our history nor in Europe's has felony disenfranchisement been justified as a means for advancing penal interests.

IV. Felony Disenfranchisement Laws Are Not Entitled to *Sui Generis* Treatment as Part of the Criminal Process, Because Permanently Disenfranchising Ex-Felons Does Not Materially Advance Any Legitimate Penal Interest.

Today, felony disenfranchisement laws in the States encompassed by the Eleventh Circuit are the only "voting qualifications" that fall entirely beyond the reach of Section 2 of the Voting Rights Act. But Congress could not rationally have intended, as the Eleventh Circuit (contrary to

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[40] *See id.* at 724.

[41] Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1302 (1989) (citation and internal quotation marks omitted).

[42] *See* U.S. CONST. art. III, § 3, cl. 2.

[43] *See* Itzkowitz & Oldak, *supra* note 37, at 725.

the Ninth Circuit) held below, that laws serving no legitimate penal interest would be exempt from coverage under Section 2 of the VRA — a federal statute intended to root out state laws that disproportionately exclude minority citizens from the franchise for no good reason. Because permanent felony disenfranchisement laws perpetuate the kind of senseless exclusion that the Act was meant to eradicate, they must be actionable under the VRA.

Indeed, among respected authorities on criminal justice, there is a growing consensus against the disenfranchisement of ex-felons past the period of their sentence and post-release supervision. The American Bar Association and the American Law Institute (ALI) have long opposed such disenfranchisement because the "stigma of exclusion . . . deter[s] rehabilitation and increase[s] the likelihood of recidivism."[44] The ALI's Model Penal Code prohibits disenfranchisement that continues after "a sentence of imprisonment" has ended.[45]

More recently, the American Correctional Association has adopted a resolution opposing disenfranchisement after "completion of the offender's sentence including community supervision" because it "work[s] against the successful reentry [into the community] of offenders as responsible,

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[44] Andrew L. Shapiro, *The Disenfranchised*, THE AMERICAN PROSPECT at 60 (Nov.-Dec. 1997); *see* American Bar Association, *Standards for Criminal Justice 23-8.4: Voting Rights* (2d ed. 1983).

[45] MODEL PENAL CODE § 306.3 (2001). Similarly, the United Nations Human Rights Committee, which reviews adherence to the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a signatory, has rejected the automatic imposition of lifetime disenfranchisement. *See* General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the ICCPR, CCPR/C/21/Rev.1/Add.7, Aug. 27, 1996, Annex V(1), *quoted in* JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 21 (1998).

productive citizens."[46] And a recent president of the National District Attorneys Association likewise has voiced concern about creating a "subclass of citizens who, even after doing what they were ordered to do by a judge, are . . . disenfranchised from the vote and continually labeled as criminals. To no one's surprise, they may believe they have no recourse but to continue to live outside the law."[47]

Faced with this growing consensus in the law-enforcement and correctional community, the Eleventh Circuit blithely accepted Florida's conclusory assertion that permanently disenfranchising ex-felons furthers the State's penal interests.[48] But as *amici* show here, the permanent exclusion of a citizen from the political community does not materially advance any accepted goal of the criminal-justice system, such as prevention, deterrence, or retribution. And a lifetime exclusion from voting gravely disserves the State's interest in rehabilitating the offender and reintegrating him into civil society.

A. Incapacitation/Prevention

The incapacitation rationale for punishment is that a person who has committed a crime is likely to do so again and that punishment is therefore necessary to prevent him from breaking the law again. Typically, this punishment takes the form of physically incarcerating the offender. In this case, Florida has articulated one such preventive rationale: It asserted below, without elaboration, that

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[46] American Correctional Association, Resolution on the Restoration of Voting Rights (Jan. 14, 2004), *available at* http://www.aca.org/pastpresentfuture/Winter_2004_Resolutions.asp#15.

[47] Robert M. A. Johnson, *Message from the President — Collateral Consequences*, National District Attorneys Association (May/June 2001), *available at* http://www.ndaa-apri.org/ndaa/about/president_message_may_june_2001.html.

[48] *See* Pet. App. 29a, 405 F.3d at 1228.

permanently disenfranchising all ex-felons is necessary to "insur[e] the integrity of elections."[49]

This justification is unpersuasive. The State has identified no evidence that ex-offenders who have completed their terms of incarceration and supervision are prone to commit offenses affecting the integrity of elections. And *amici* are unaware of any such evidence. Notably, Florida has not limited its permanent ban on voting to those felons who have previously committed election-related offenses.[50] Permanently disenfranchising *all* ex-felons is a wildly overbroad response to the State's asserted concern.

Florida also articulates a preventive rationale when it claims that ex-felons are "unlikely to exercise [the right to vote] responsibly."[51] The theory apparently is that they will vote against pro-law-enforcement candidates and initiatives. But this asserted concern about "the purity of the ballot box" surely is not a valid basis for permanent disenfranchisement. In the many States that allow ex-felons to vote, there is no evidence that they vote in bloc, let alone in a socially disruptive manner. Moreover, excluding a group from the electorate based on predictions about how they would vote is flatly unconstitutional. In *Carrington v. Rash*,[52] this Court considered Texas's constitutional provision prohibiting military personnel who moved to Texas from voting. Texas claimed a "legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose

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[49] Mem. of Law in Supp. of Defs.' Mot. for Summ. J., at 20.

[50] *See* Itzkowitz & Oldak, *supra* note 37, at 738-39 (possibility that election offense may be committed by class of ex-criminals is negligible).

[51] Reply Brief in Supp. of Defs.' Mot. for Summ. J., at 13 n.15.

[52] 380 U.S. 89 (1965).

collective voice may overwhelm a small local civilian community."[53] This Court struck down the law:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of . . . rights so vital to the maintenance of democratic institutions" cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.[54]

Indeed, the Voting Rights Act pointedly prohibits States from conditioning the right to vote on any demonstration of knowledge, aptitude, or character.[55]

B. Deterrence

Perhaps the most commonly asserted goal of punishment is to deter future criminal conduct, whether by the particular offender (specific deterrence) or by others (general deterrence). There is, however, no basis whatsoever to conclude that permanently disenfranchising ex-felons serves to deter them from committing new crimes, or to deter others from committing felonies and joining their ranks. Notably, while asserting that this law serves its penal interests, even Florida has never claimed that disenfranchisement has value as a deterrent to crime.

Rather, deterrence flows from the other penal consequences of a felony conviction, including a lengthy term of incarceration (by definition, a felony carries a

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[53] *Id.* at 93.

[54] *Id.* at 94 (citation omitted).

[55] *See Oregon v. Mitchell*, 400 U.S. 112, 144-45 & n.9 (1970) (upholding the VRA provision that bars States from requiring voters to pass tests of "good moral character" or of "knowledge of any particular subject"); *see also Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972) (deriding "purity of the ballot box" as a "quasi-metaphysical invocation").

potential prison sentence of more than a year) and significant fines. If these consequences cannot deter a potential offender, it is not credible to suggest that the loss of voting rights upon concluding post-incarceration supervision would.

C. Retribution

Punishment may also be justified as a form of moral desert. The ancient notion of "civil death" — in which the offender was stripped of his civil rights — was understood in part as such a form of retribution. During ancient times, apart from losing the franchise, an offender was stripped of his chattel and other goods, deemed unfit to marry or to inherit property, and forbidden to possess or divide his estate for his heirs.[56]

We live in a very different era. For one thing, the Constitution imposes limits on retributive punishment, such as the Eighth Amendment's prohibitions on "excessive fines" and "cruel and unusual" punishments.[57] More generally, the law-enforcement community and society at large now recognize that a punishment can be morally justified as retribution only if it is reasonably proportionate in severity and duration to the crime in question.[58] Today, no one could seriously assert, for example, that permanently stripping all ex-felons of the right to marry or to inherit property would be a justifiable form of retribution.

In the context of the right to vote, *amici* believe that disenfranchisement after the ex-felon has served his term of

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[56] *See* Itzkowitz & Oldak, *supra* note 37, at 723, 736.

[57] U.S. CONST. amend. VIII.

[58] The penological principle of proportionality holds that "the severity of the criminal sanction should be limited by the seriousness of the offense and the relevant attributes of the offender." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 35 (Marc Mauer & Meda Chesney-Lind eds., 2002).

imprisonment and any subsequent period of official supervision is unjustifiably disproportionate. Once the State has relinquished any further claim to be otherwise punishing, reforming, or monitoring the ex-offender, there is no legitimate basis for stripping him of his right to participate in the electoral process. Such exclusion instead appears more akin to the types of denunciatory "shaming" and branding of offenders that have long been discredited as archaic. By modern standards, a collateral consequence like permanent disenfranchisement "runs counter to the adage that 'after the sentence is served, the offender has paid his or her debt to society.'"[59]

Laws mandating the life-long denial of voting rights permanently destroy the ex-offender's most direct form of participation in the central process of self-government and render the group of ex-felons invisible to elected officials. As one court has put it, disenfranchisement saddles one segment of the population with

> the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . , the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.[60]

Permanent disenfranchisement is unjustifiably disproportionate for a second reason. At common law, and

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[59] Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 160-61 (1999) (citation and internal quotation marks omitted).

[60] *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

at the time the Reconstruction Amendments were ratified, relatively few offenses were deemed felonies, mostly involving violence or forceful invasions of property. Today, however, federal and state felony statutes apply to a broad range of activity, including countless regulatory violations, as reflected in the exponentially increasing number of Floridians to whom the State's disenfranchisement law applies. For example, it is a felony in Florida today for a wholesaler intentionally to sell malt beverages to a vendor without first allowing them to come to "rest at the [wholesaler's] licensed premises."[61]

Permanently banning voting by such a broad class of ex-offenders sweeps far beyond the original retributive logic of denying the franchise to a still-incarcerated violent felon. *Amici* therefore submit that, under Voting Rights Act analysis, the State's retributive interest in this penalty is tenuous at best.

D. Rehabilitation

The fourth and final goal of punishment is to rehabilitate the offender and reintegrate him into mainstream society. No State has an interest in creating a permanent underclass of ex-offenders who are blocked or inhibited by virtue of their prior offenses from contributing productively to the Nation, the polity, and their communities. But as *amici* know from their experiences in law enforcement, reintegrating an offender into civil society is a daunting challenge under the best of circumstances.[62]

Denying the right to vote only adds an additional barrier to successful reintegration, particularly where (as in Florida

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[61] FLA. STAT. ANN. § 561.5101 (West 2005).

[62] *See* Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, in NATIONAL INSTITUTE OF JUSTICE'S SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 5 (2000).

today) this denial falls disproportionately on members of a racial minority group. As a past president of the American Society of Criminology recently observed, "denying large segments of the minority population the right to vote is likely to cause further alienation. Disillusionment with the political process also erodes citizens' feelings of engagement and makes them less willing to participate in local political activities and to exert informal social control in their community."[63] The State's interest in rehabilitation would be far better served by reenfranchising ex-offenders who have completed their terms of incarceration and supervision.

* * *

In this case, if Section 2 were to apply, Florida would bear a substantial burden of justification. The statistics set out at the start of this brief, and others identified by Petitioners, demonstrate that the State's permanent disenfranchisement of ex-felons lopsidedly bars African-American citizens from the voting booth. In addition, compelling evidence demonstrates that the motivation behind that law, as originally enacted, was to constrict the size and influence of the black electorate. Petitioners have further demonstrated that the other "Senate factors" heavily favor their claim of illegal vote denial. Further heightening the State's burden of justification is the utter absence of any legislative (or other) history corroborating the State's present claim that disenfranchisement was intended to advance the State's "penal interests."

Unfortunately, the court below never reached these issues, critical to hundreds of thousands of Florida citizens,

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[63] *Id.*; *see also United States v. K*, 160 F. Supp. 2d 421, 434 (E.D.N.Y. 2001) (reviewing the literature demonstrating that felony disenfranchisement laws have "frustrated the released felon's attempt to integrate himself or herself into society" and "serve to further estrange released offenders from mainstream society").

because it incorrectly held, contrary to the Ninth Circuit, that felony disenfranchisement laws are never subject to review under Section 2 of the Voting Rights Act.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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